

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
Petition of Cablevision Lightpath, Inc. For)	
Forbearance Under 47 U.S.C. §160(c))	
From Title II And <i>Computer Inquiry Rules</i> with)	WC Docket No. 07-12
Respect to Broadband Services)	

**COMMENTS OF THE
NEW JERSEY DIVISION OF RATE COUNSEL**

Ronald K. Chen, Esq.
Public Advocate of New Jersey

SEEMA M. SINGH, ESQ.
RATE COUNSEL
31 Clinton Street, 11th Floor
Newark, NJ 07102
(973) 648-2690 - Phone
(973) 648-2193 - Fax
www.rpa.state.nj.us

On the Comments:
Christopher J. White, Esq.
Deputy Ratepayer Advocate

Date: February 9, 2007

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I. INTRODUCTION

In response to the Public Notice released on February 6, 2007,¹ the New Jersey Division of Rate Counsel (“Rate Counsel”) (formally the New Jersey Division of the Ratepayer Advocate)² hereby submits its comments in response to DA 07-365 and the

¹/ See Public Notice, DA 07-365, dated February 6, 2007, establishing pleading cycle with Comments due on March 8, 2007 and reply comments due on March 23, 2007.

²/ Effective July 1, 2006, the New Jersey Division of the Ratepayer Advocate is now Rate Counsel. The office of Rate Counsel is a Division within the New Jersey Department of the Public Advocate. The Department of the Public Advocate is a government agency that gives a voice to New Jersey citizens who often lack adequate representation in our political system. The Department of the Public Advocate was originally established in 1974, but it was abolished by the New Jersey State Legislature and New Jersey Governor Whitman in 1994. The Division of the Ratepayer Advocate was established in 1994 through enactment of Governor Whitman’s Reorganization Plan. See New Jersey Reorganization Plan 001-1994, codified at N.J.S.A. 13:1D-1, et seq. The mission of the Ratepayer Advocate was to make sure that all classes of utility consumers receive safe, adequate and proper utility service at affordable rates that were just and nondiscriminatory. In addition, the Ratepayer Advocate worked to insure that all consumers were knowledgeable about the choices they had in the emerging age of utility competition. The Department of the Public Advocate was reconstituted as a principal executive department of the State on January 17, 2006, pursuant to the Public Advocate Restoration Act of 2005, P.L. 2005, c. 155 (N.J.S.A. §§ 52:27EE-1 et seq.). The Department is authorized by statute to “represent the public interest in such administrative and court proceedings ... as the Public Advocate deems shall best serve the public interest,” N.J.S.A. § 52:27EE-57, i.e., an “interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens.” N.J.S.A. § 52:27EE-12; The Division of Rate Counsel, formerly known as the Ratepayer Advocate, became a division therein to continue its mission of protecting New Jersey ratepayers in utility matters. The Division of Rate Counsel represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. Rate Counsel participates in Federal and state administrative and judicial proceedings.

petition filed by Cablevision Lightpath, Inc. (“Lightpath”) asking for forbearance with regard to certain provisions of the Federal Telecommunications Act of 1996. On January 16, 2007, Lightpath asks the Commission to forbear from applying Title II requirements and applicable *Computer Inquiry* rules to broadband services offered by Lightpath. Lightpath states that the grant of forbearance is in the public interest because it would continue to foster the development of broadband services and provide consumers truly competitive choices in the marketplace.

II. SUMMARY

Rate Counsel urges the Commission to deny Lightpaths’s petition due to Lightpath’s failure to meet the standards of proof set forth in Section 160 of the Telecommunications Act of 1996, which is required before the Commission can exercise its forbearance authority.

The forbearance standard in Section 160 is only allowed where the enforcement of the regulation or section of the Act at issue is not necessary to ensure that services are discriminatory, not necessary for the protection of consumers, and is in furtherance of the public interest.³ Rate Counsel submits that Lightpath has failed to demonstrate that each element required for forbearance has been met. If the petition is granted, Lightpath would no longer be required under Title II to “establish physical connection with other carriers” and do so in a just, reasonable, and nondiscriminatory manner.⁴ The elimination

^{3/} 47 U.S.C. § 160(a).

^{4/} 47 U.S.C. § 201(a); 47 U.S.C. § 202(a).

of Lightpath's obligation to connect its facilities with other carriers who provide competing broadband services and the Lightpath's propensity to discriminate against carriers violates the first prong of the forbearance test. The forbearance petitions also violate the second prong of the forbearance test which requires a petitioner to demonstrate that enforcement of the specific regulation is not necessary for the protection of consumers. Rate Counsel submits that the maintenance of network neutrality is critical because it allows consumers the freedom to access content, run applications and use equipment of their choice. Network neutrality obligations also allow customers to switch from one broadband service to another service provider if they were dissatisfied with service. If the petition is granted, any customer of Lightpath who wants to switch to another broadband provider may no longer be able to do so.

The petition also fails to satisfy the third prong of the forbearance test which examines whether the forbearance is in the public interest. Rate Counsel submits that the grant of the petition, if approved, will result in higher prices, fewer broadband alternatives, and decreased service quality. Furthermore, petitioner's argument that that it should be granted the same relief as granted to Verizon Telephone Companies is unpersuasive. Section 706 of the Act does not grant or bestow upon the FCC the exclusive right to promote broadband. There is nothing in the Act that permits the FCC to preempt states from promoting and regulating broadband. There is no clearly expressed Congressional intent to remove the role of states in promoting broadband. To use forbearance to preclude or limit states in regulation broadband is constitutionally infirmed.

Notwithstanding the fact that this petition and the other petitions filed in WC Docket Nos. 06-125 and 06-147 are without merit and should be denied by the Commission based on the reasons discussed above, Rate Counsel renews the arguments and incorporates those arguments hereto with respect to the constitutional infirmities associated with the Commission's forbearance authority. Specifically any exercise of the forbearance authority contained in Section 10 of the Act violates separation of powers, equal protection, 10th Amendment, and 11th Amendment as outlined in detail in our Ex Parte filing dated December 7, 2004 in the UNE Remand proceeding (CC Docket No. 01-338 and WC Docket No. 04-313).

This petition is without merit and should be denied. This petition like the other forbearance petitions lack empirical and evidentiary support and offers mere conclusions in support of the petition.

III. THE PETITION SHOULD BE DENIED.

Rate Counsel incorporates by reference the arguments made in WC Docket Nos. 06-125 and 06-147 and rely upon those comments in support of the denial of this petition. Lightpath has simply filed a me-too petition relying on the fact that other forbearance petitions have been filed as the primary justification for the grant of its petition. In addition, Lightpath argues that because the Verizon petition was deemed granted on March 19, 2006, the same relief is appropriate for it. This provides no basis for the grant of the petition.

No amount of unsupported rhetoric can overcome the facts that grant of the petition will not promote the public interest and protect consumers. Rate Counsel also incorporates by reference its comments filed in *I/M/O Section 272(f)(1) Sunset of the*

BOC Separate Affiliate and Related Requirements, 2000 Biennial Regulatory Review Separate Affiliate Requirement of Section 64.1903 of the Commission's Rules, WC Docket No. 02-112, CC Docket No. 00-175, FCC 03-111, Further Notice of Proposed Rulemaking (2003). (“*FNPRM*”). In particular, even if the FCC were to grant the petition-which it should not- Rate Counsel submits that at a minimum, the FCC should continue to impose non-structural safeguards requirements of Section 64.1903⁵. Such requirements should be applied to Lightpath, as a LEC to provide disincentives to engage in discriminatory behavior.

The protections of Section 64.1903 are necessary to accomplish the goals and objectives of the Act, especially in an ever-shrinking telecommunications market. While the 1996 Act fostered competition, and in turn the prospects of competition fueled economic growth, investment and development, the prospect of a return to monopolistic control can overpower economic investment, development, and enthusiasm, an outcome the FCC must take definitive steps to avoid.

^{5/} Section 64.1903 requires that interexchange carriers affiliated with independent LECs would be regulated as non-dominant provided that the affiliate providing interstate interexchange services: (1) maintain separate books of account, (2) not jointly own transmission or switching facilities with its affiliated exchange telephone company; and (3) acquire any services from its affiliated exchange telephone company at tariffed rates, terms, and conditions. *See Competitive Carrier Fifth Report and Order*, 98 FCC2d at 1198, para. 9.

IV. CONCLUSION

The Commission should not grant the petition. Ultimately, the grant of any relief would harm ratepayers. Such a result is contrary to the public interest. Therefore, Rate Counsel urges that the FCC deny the petition.

Respectfully submitted,

SEEMA M. SINGH, ESQ.
RATE COUNSEL

By: *Christopher J. White*
Christopher J. White, Esq.
Deputy Ratepayer Advocate

Dated: February 9, 2007